In the Supreme Court
OF THE
United States

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OCTOBER TERM, 1943

No. 765

RUSSELL G. SMITH,
Petitioner (Appellant Below),
vs.
L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor,
Respondent (Appellee Below).

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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RUSSELL G. SMITH,
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vs.
L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor,
Respondent (Appellee Below).

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Russell G. Smith petitions that a writ of certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered and filed on December 30, 1943, in a cause pending in

that Court numbered and entitled, "No. 10,439, Russell G. Smith, Appellant, vs. L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Appellee". (R. 181.) Said judgment affirmed an order of the United States District Court for the Northern District of California, Southern Division, adjudging petitioner to be guilty of contempt and committing him to the custody of the United States Marshal until he should purge himself thereof. Said judgment and decision of the United States Circuit Court of Appeals is not yet reported but should appear in 139 Fed. 2d. The decision appears in the record of this case at page 181.

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

In the United States District Court for the Northern District of California, Southern Division, a complaint was filed by the Administrator of the Fair Labor Standards Act of 1938, plaintiff, against the Bank of America National Trust and Savings Association, defendant, seeking an injunction enjoining the defendant from violating the provisions of said Act. (R. 2, 22.) The petitioner herein was not a party to the suit in the United States District Court, and the complaint in that case was not in the record on appeal to the United States Circuit Court of Appeals.[1]

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[1]In this connection the United States Circuit Court in a footnote to its decision stated:

> "The records on appeal do not contain the complaint or the Bank's answer, and what is said here in respect of the condition of the pleadings is obtained from the briefs." (R. 182.)

In the United States District Court under Rule 34 of the Federal Rules of Civil Procedure the plaintiff obtained an order directing the defendant bank to produce certain books and records for examination. Petitioner was not named in this order. (R. 10.) Petitioner was an officer of said defendant bank and failed to produce the books and records. (R. 17.) Thereupon an order to show cause was issued against petitioner directing him to show cause, if any he might have, why he should not be held in contempt of Court for failure to produce the books and records. (R. 21.) To this order to show cause petitioner filed a verified return in which he alleged as a matter of fact that the District Court had no jurisdiction of the subject matter because the defendant bank had no employees engaged in interstate commerce. (R. 22 and 23.) A hearing was held in the District Court and upon the mere showing that petitioner had so failed to produce the books and records he was found to be in civil contempt of Court and was directed to be placed in the custody of the United States Marshal. (R. 99, 128, 148, 155.) Petitioner was released on his own recognizance pending appeal.

Petitioner appealed to the United States Circuit Court of Appeals for the Ninth Circuit, and that court affirmed the judgment of contempt of the lower court. (R. 188.) The Circuit Court stated that jurisdiction in the separate contempt proceeding was sustained by allegations in the complaint in the principal cause which was not in the record on appeal and to which petitioner was not a party. (R. 186, 187.)

II.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is invoked under Section 240, Subdivision (a) of the Judicial Code. (28 USCA, Section 347a.) Cases sustaining the jurisdiction of this Court are *McCrone v. United States* (1939), 307 U. S. 61, and *Nye v. United States,* 313 U. S. 33.

The decision and judgment of the United States Circuit Court of Appeals was entered and filed on December 30, 1943. On January 27, 1944, a petition for rehearing was filed which was denied on February 1, 1944.

III.

THE QUESTIONS PRESENTED.

This case presents the following questions:

(1) Whether in civil contempt proceedings the constitutional guaranties of due process must be observed.

(2) Whether a United States District Court can legally find a person guilty of contempt of court where the record before said court affirmatively establishes that said court is acting without jurisdiction.

(3) Whether a determination by a United States Circuit Court of Appeals affirming a judgment of contempt by a United States District Court is subject to review in this court where such judgment is clearly erroneous and there is no evidence in the record to support it.

(4) Whether a United States Circuit Court of Appeals may affirm a conviction for contempt by a United States District Court where the evidence and the record affirmatively establish without conflict that the District Court had no jurisdiction.

(5) Whether a United States Circuit Court of Appeals in affirming a judgment of the United States District Court which is not supported by any evidence in the record may resort to matters not a part of the record and not within judicial notice.

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

This case presents important and serious questions in the administration of justice in the federal courts. The case squarely presents the issue of whether a witness, or third person, brought into a case to which he is not a party is entitled in a contempt proceeding to the constitutional guaranties of due process prior to being deprived of his liberty. The record in the contempt proceeding affirmatively showed the United States District Court to be without jurisdiction; nevertheless, the District Court proceeded to find petitioner guilty and to punish him. This directly violates the due process provisions of the Federal Constitution. A review on writ of certiorari should be granted because the United States Circuit Court of Appeals has affirmed a decision probably in conflict with the appli-

cable decisions of this Court. (*Hovey v. Elliott,* 167 U. S. 409; *Cooke v. U. S.,* 267 U. S. 517.)

Certiorari should also be granted because the United States Circuit Court by its decision has sanctioned a departure by the lower court from the accepted and usual course of judicial proceedings in that it has sanctioned a procedure in which an individual is deprived of liberty without conformance to the most elemental concepts of due process. (*Mooney v. Holohan,* 294 U. S. 103.)

Further, the United States Circuit Court has departed from the accepted and usual course of judicial procedure in affirming a judgment of the District Court, which is a court of limited jurisdiction, where the record affirmatively establishes lack of jurisdiction. It should be emphasized that this is not a case of conflicting evidence, but a case where *the only evidence in the record* shows no jurisdiction. In this regard the decision of the United States Circuit Court of Appeals for the Ninth Circuit is contra to the decisions of other Circuits and of this Court which held that a federal Court is one of limited jurisdiction and that jurisdiction is never presumed. On the contrary it is held that the Court is without jurisdiction unless such affirmatively appear from the record. Certiorari is required because this point arises in a case where personal liberty is directly concerned. (*Ex parte Smith,* 94 U. S. 455.)

In addition the United States Circuit Court departed from the accepted and usual course of judicial proceedings in that it affirmed a judgment of the United States District Court through resort to assumed facts not within judicial notice and not found in the record. In this regard the decision of the Circuit Court of Appeals is again in conflict with the decisions of other circuits and with the applicable decisions of this Court. (*White v. Central Dispensary and Emergency Hospital,* 99 Fed. (2d) 355; *West Ohio Gas Co. v. Public Utilities Commission,* 294 U. S. 63.) The case directly presents a most serious question in the administration of justice, i.e., to what extent when individual liberty is at stake may a reviewing court go beyond the record and judicial notice to support a judgment.

Wherefore, petitioner prays that this Court issue its writ of certiorari directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings in the cause numbered and entitled in said Court "No. 10,439, Russell G. Smith, Appellant, v. L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Appellee", to the ends that said cause may be reviewed by this Court as provided by law; that said judgment of said Circuit Court of Appeals be reversed and that your

petitioner have such other and further relief in the premises as this Court may deem proper.

Dated, San Francisco, California,
March 1, 1944.

Respectfully submitted,
LOUIS FERRARI,
G. D. SCHILLING,
PHILIP S. EHRLICH,
Attorneys for Petitioner.

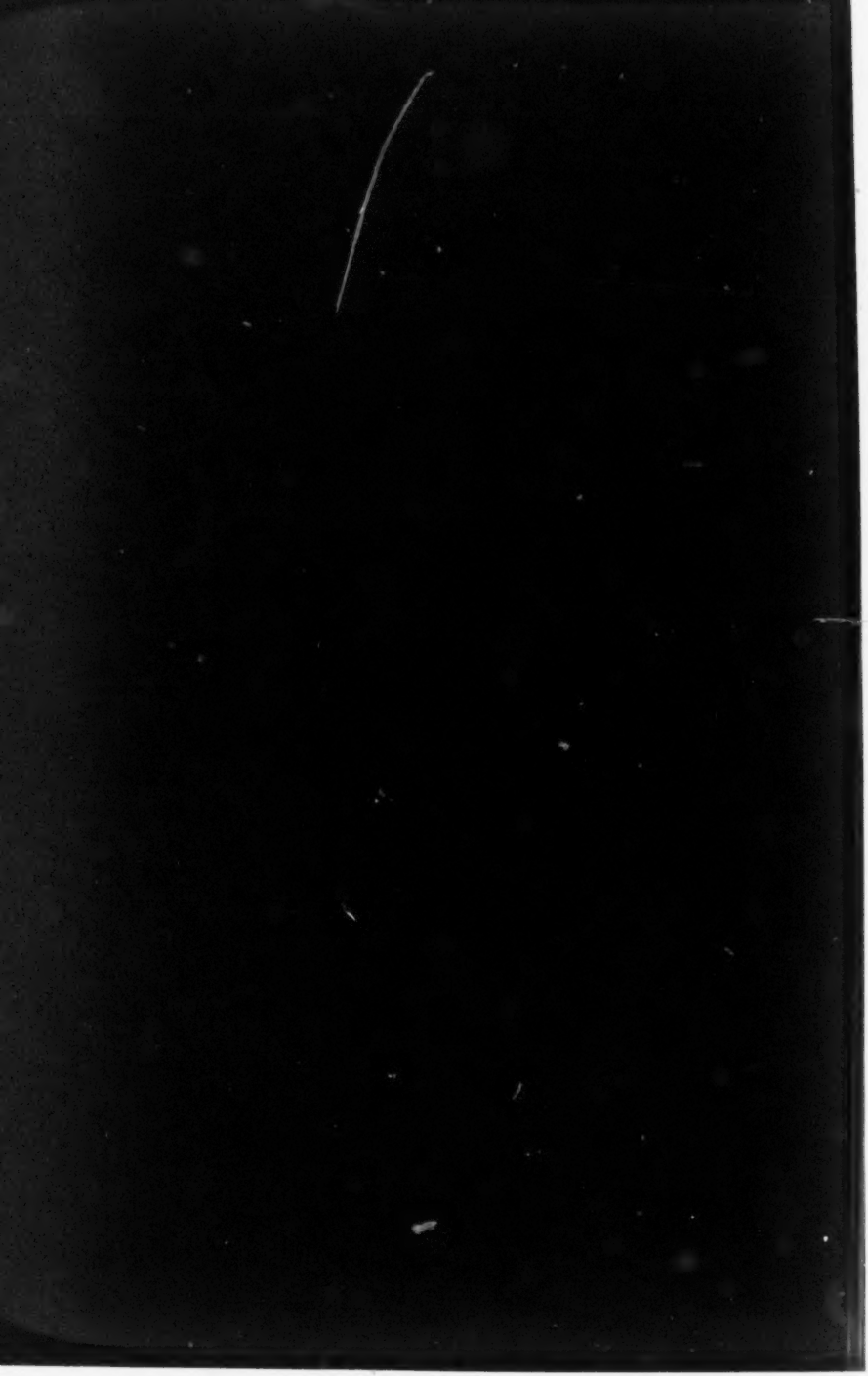
KENNETH M. JOHNSON,
Of Counsel.

CERTIFICATE OF COUNSEL.

The foregoing petition for writ of certiorari together with the hereinafter contained supporting brief, is well founded in point of fact and law, is presented in good faith, and is not interposed for delay.

Dated, San Francisco, California,
March 1, 1944.

LOUIS FERRARI,
Of Counsel for Petitioner.



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No.

RUSSELL G. SMITH,
Petitioner (Appellant Below),

vs.

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor,
Respondent (Appellee Below).

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS BELOW.

The opinion below, 139 Fed. (2d) ....., is not yet reported but appears in the record of this case at page 181.

II.

JURISDICTION.

The jurisdiction of this Court to review upon writ of certiorari a final determination of a United States Circuit Court of Appeals is set forth in the preceding petition for the writ which statement is here adopted as the statement as to jurisdiction and is therefore not repeated.

III.

STATEMENT OF THE CASE.

The material facts are set forth and the nature of the case is stated in the foregoing petition for a writ under the heading "Summary Statement of the Matter Involved". This statement is here adopted as the statement of the case and is therefore not here repeated.

IV.

SPECIFICATIONS OF ERROR.

The Circuit Court of Appeals committed error in the following respects:

1. In affirming a judgment of the United States District Court which deprived petitioner of his liberty and which denied to petitioner the constitutional guaranties of due process.

2. In affirming a judgment of the United States District Court where the only evidence in the record

affirmatively established that Court to be without jurisdiction.

3. In affirming the judgment of the United States District Court by resorting to material not in the record before the said United States Circuit Court of Appeals and not within judicial notice.

V.

ARGUMENT.

(a) SUMMARY OF ARGUMENT.

Petitioner's argument in brief is as follows:

1. The deprivation of personal liberty by a Court having no jurisdiction, and where the record shows the Court to be without jurisdiction, is a denial of due process under the Constitution of the United States.

2. It is not contempt to violate an order which the court had no jurisdiction to issue.

3. Jurisdiction of the federal courts cannot be presumed and particularly cannot be sustained through the use of material not within judicial notice and outside of the record.

(b) THE DEPRIVATION OF PERSONAL LIBERTY BY A COURT HAVING NO JURISDICTION, AND WHERE THE RECORD SHOWS THE COURT TO BE WITHOUT JURISDICTION, IS A DENIAL OF DUE PROCESS UNDER THE CONSTITUTION OF THE UNITED STATES.

The requirement of due process in judicial proceedings is not only specifically set forth in the Fifth Amendment to the Constitution, but is inherent in the jurisprudence of the United States. The general principles have been stated by this Court and other courts many times. The expression "due process of law" means that there can be no proceeding against liberty or property which may result in the deprivation of either without the observance of those general rules established in our system of jurisprudence for the security of private rights. (*Turpin v. Lemon,* 187 U. S. 51; *Endicott-Johnson Corp. v. Ency. Press,* 266 U. S. 285.) One of the most settled rules in the administration of justice in the United States is that any judgment must be supported by proof. (*The Hoppet v. United States,* 7 Cranch 389; *Lancaster v. Collins,* 115 U. S. 222.) This Court has on several occasions asserted another fundamental, i.e., that the Court determining the cause must have jurisdiction. (*Scott v. McNeal,* 154 U. S. 34; *Twining v. New Jersey,* 211 U. S. 78.)

In the case before this Court petitioner was cited on a charge of contempt arising out of a cause to which he was not a party. A separate proceeding to determine the alleged contempt of petitioner was instituted. In response to the order to show cause, petitioner filed a verified return in which he alleged under

oath certain facts which affirmatively established no jurisdiction in the District Court to issue the order which it was alleged that petitioner had not obeyed.

Petitioner in his return alleged under oath that the defendant bank, in the action to which he was not a party, and whose records were sought, had no employees engaged in interstate commerce. (R. 22.) As the principal action involved the Fair Labor Standards Act of 1938, this was the critical element as to the jurisdiction of the District Court. If true, the Court had no jurisdiction as the application of the Act is dependent on the character of the employees' activities. (*Kirschbaum v. Walling,* 316 U. S. 517; *Walling v. Jacksonville Paper Co.,* 317 U. S. Adv., 87 L. ed. 393.) The United States District Court disregarded entirely the evidence establishing no jurisdiction and no findings were made thereon. On a mere showing that petitioner had not complied with the order previously issued by the District Court and in face of his return showing no jurisdiction, he was declared to be in contempt and placed in custody for an indefinite period of time.

This Court has on various occasions defined in detail what it will require to satisfy the mandate of due process found in the Constitution. Minimum requirements are that the Court have jurisdiction and that judgment comply with proof. In general the language of this Court in *St. Joseph Stock Yards Co. v. United States* (1935), 298 U. S. 38, 77, is particularly pertinent. Here the Court said:

> "The first distinction is between issues of law and issues of fact. When dealing with constitutional rights (as distinguished from privileges accorded by the government * * *) there must be the opportunity of presenting in an appropriate proceeding, at some time, to some court, every question of law raised, whatever the nature of the right invoked or the status of him who claims it. The second distinction is between the right to liberty of person and other constitutional rights * * * A citizen who claims that his liberty is being infringed is entitled, upon habeas corpus, to the opportunity of a judicial determination of the facts. And, so highly is this liberty prized that the opportunity must be accorded to any resident of the United States who claims to be a citizen."

Again in *Hovey v. Elliott* (1897), 167 U. S. 409, 414, this Court restated the fundamental requirements of due process:

> "Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. * * * A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, Appear and you shall be heard; and, when he has ap-

> peared, saying, Your appearance shall not be recognized, and you shall not be heard. In the present case, the district court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict clothed in the form of a judicial sentence."

The language in the above case applies directly to petitioner. The United States District Court said to petitioner, there shall be a hearing but there will be no consideration of evidence establishing no jurisdiction. The Circuit Court of Appeals has said there is a right of appeal, but on such appeal we will not consider whether the United States District Court was correct in ignoring the uncontradicted evidence which established the want of jurisdiction. The naked right of appeal is of no value unless at least the Appellate Court is willing to review and consider whether at least the fundamental elements of due process have been complied with. A case directly in point is *Cooke v. United States* (1925), 267 U. S. 517, 537, where this Court said:

> "Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and

in mitigation of the penalty to be imposed. See Hollingsworth v. Duane, Wall. Sr. 77, Fed. Cas. No. 6,616; Re Stewart, 118 La. 827, 43 So. 455; Re Clark, 208 Mo. 121, 15 L. R. A. (N.S.) 389, 106 S. W. 990.

"The proceeding in this case was not conducted in accordance with the foregoing principles. * * *

"The court proceeded on the theory that the admission that the petitioner had written the letter foreclosed evidence or argument. In cases like this where the intention with which acts of contempt have been committed must necessarily and properly have an important bearing on the degree of guilt and the penalty which should be imposed, the court cannot exclude evidence in mitigation. It is a proper part of the defense."

This Court in the *Cooke* case, which is one involving contempt, has directly stated that matters going to defense must be considered and that if there is an excuse the mere admission of noncompliance with an order is not sufficient to justify the commitment for contempt.

The plain unvarnished fact is that the record shows without conflict a complete defense which the Court ignored. This even under the most limited concept of the guaranties of our Constitution is lack of due process. In *Mooney v. Holohan* (1935), 294 U. S. 103, 112, this Court said:

"* * * the Attorney General contends that 'it is only where an act or omission operates so as to deprive a defendant of notice or so as to deprive him of an opportunity to present such evidence

as he has, that it can be said that due process of law has been denied'.

"Without attempting at this time to deal with the question at length, we deem it sufficient for the present purpose to say that we are unable to approve this narrow view of the requirement of due process. That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions."

Regardless of the fact that two courts have found petitioner to be guilty of contempt, the question is properly open for review by this Court because the record discloses without conflict that the judgment is erroneous. In *District of Columbia v. Pace* (Jan. 10, 1944), ... U. S. ....., Justice Jackson of this Court stated the rule as follows:

"when two courts have reached the same conclusion on a question of fact, their finding will not be disturbed unless it is clear that their conclusion was erroneous."

This is not a case involving a conflict of evidence or the weight thereof; it is a case where jurisdiction is conditioned upon certain facts and where the *sole evidence* as to said facts affirmatively established the lack of jurisdiction of the United States District Court.

This case not only is in absolute conflict with the decisions of this Court but is also of the utmost importance in the administration of justice because unless reversed it opens the doors in private litigation

to a situation where one may be placed in jail for an indefinite period without an opportunity to challenge the jurisdiction of the court so committing. This is not only shocking, it is unthinkable in the United States as of today; it is a reversion to the Star Chamber methods of the remote past. Certiorari is necessary to prevent a whittling away by judicial acquiescence of rights which we are now at war to preserve.

(c) IT IS NOT CONTEMPT TO VIOLATE AN ORDER WHICH THE COURT HAD NO JURISDICTION TO ISSUE.

That the question of jurisdiction of the United States District Court was of paramount importance and proper to be raised by petitioner in his defense is clear. This Court has time and time again stated that if the order disobeyed is issued by a court without jurisdiction, a judgment of contempt for failure to comply is void. In *Ex parte Sawyer* (1887), 124 U. S. 200, 222, this Court said:

> "The circuit court being without jurisdiction to entertain the bill in equity for an injunction, all its proceedings in the exercise of the jurisdiction which it assumed are null and void. The restraining order, in the nature of an injunction, it had no power to make. The adjudication that the defendants were guilty of a contempt in disregarding that order is equally void; their detention by the marshal under that adjudication is without authority of law, and they are entitled to be discharged. *Ex parte Rowland*, 104 U. S. 604 [26:861]; *Ex parte Fisk*, 113 U. S. 713 [28:1117] * * *"

The *Sawyer* case is essentially similar to that of petitioner. Petitioner in a proceeding for an injunction failed to comply with a preliminary order in that suit to which he was not a party and presented uncontradicted evidence showing the United States District Court to be without jurisdiction. Under the *Sawyer* case this was a complete defense. Under the requirements of due process petitioner was entitled to make this defense which was ignored by the United States District Court. This improper action was affirmed by the United States Circuit Court of Appeals.

In *Ex parte Fisk* (1885), 113 U. S. 713, 718, the Court said:

> "When, however, a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, *the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void.*"

In *Beauchamp v. United States* (1935), 76 Fed. (2d) 663, 668, the Court said:

> "In order that disobedience of this injunction order may constitute contempt, it is necessary that the order be valid. Disobedience of a void mandate, order, judgment, or decree, or one issued by a court without jurisdiction of the subject-matter and parties litigant, is not contempt.
>
> "When '* * *' a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the

order punishing for the contempt is equally void. * * *' Ex parte Fisk, 113 U. S. 713, 5 S. Ct. 724, 726, 28 L. Ed. 1117; Ex parte Terry, 128 U. S. 289, 9 S. Ct. 77, 32 L. Ed. 405; In re Ayers, 123 U. S. 443, 8 S. Ct. 164, 31 L. Ed. 216."

See also

Western Fruit Growers v. Gotfried (1943), 136 Fed. (2d) 98.

This principle is also expressly stated in the applicable statutes. Section 268 of the Judicial Code (28 USCA 385) defines the situations where the District Courts have power in relation to contempt. This section expressly limits the power to punish for disobedience of orders or decrees to *lawful* orders, rules or decrees and reads in part as follows:

"The said courts shall have power to * * * punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except * * * the disobedience or resistance * * * to any lawful writ, process, order, rule, decree, or command of the said courts."

Even where the proceeding is before a Senate Investigating Committee, which in its duty to determine facts for the purpose of evaluating proposed legislation must have broad powers, the same rule is applied. In *Sinclair v. United States* (1928), 279 U. S. 263, 292, this Court said:

"it must be exerted with due regard for the rights of witnesses, and that a witness rightfully

> may refuse to answer where the bounds of the power are exceeded or where the questions are not pertinent to the matter under inquiry."

In summary a complete defense to a charge of contempt is the establishment of the lack of jurisdiction of the court to issue the order which it is alleged that the contemnor has failed to obey. In the record of this case, involving petitioner, the lack of jurisdiction is affirmatively established without contradiction.

It should be emphasized that the case before this Court involves private litigation and is thus not similar to that of a grand jury where it has been said that because of the plenary investigative powers of the grand jury a witness may not challenge the authority of such grand jury. (*Blair v. United States,* 250 U. S. 273.)

(d) **JURISDICTION OF THE FEDERAL COURTS CANNOT BE PRESUMED AND PARTICULARLY CANNOT BE SUSTAINED THROUGH THE USE OF MATERIAL NOT WITHIN JUDICIAL NOTICE AND OUTSIDE OF THE RECORD.**

As already indicated, uncontradicted allegations of fact in a verified return filed in the United States District Court affirmatively established lack of jurisdiction. In order to sustain the jurisdiction of the District Court to sentence petitioner for contempt the United States Circuit Court of Appeals ignored the record on appeal and stated that jurisdiction was sustained because of assumed allegations in an assumed complaint in the principal cause out of which the contempt arose, to which petitioner was not a party.

The Circuit Court first states that petitioner is not a party to the principal cause, admits that the lack of jurisdiction was shown in the contempt proceeding, and then sustains jurisdiction in the contempt proceeding by reliance upon the complaint in the principal cause which was not in the record and to which petitioner was not a party. (R. 186, 187.) This departure from customary judicial procedure can be no better illustrated than by comparing the two statements found in the opinion of the Circuit Court and set forth below:

"*These individual contemnors are not parties to the main cause.* They have no appeal from the final judgment to be entered in it, and unless they can obtain a review of the orders now they will have no right of review at all. As to them the commitment orders are final."

"Their argument (appellants') is that the answers in the contempt proceeding (alleging that no employees of the Bank were engaged in interstate commerce) were not controverted in that proceeding, hence the court was shown to be without jurisdiction. *But the court's jurisdiction was to be determined, not by reference to what appellants might assert, but by reference to the complaint.*"

(R. 186,187; emphasis supplied.)

In this connection the determination of the United States Circuit Court of Appeals is contrary to the prior decisions of this Court and in conflict with the decisions in other circuits in two regards: First: Jurisdiction will never be presumed; secondly, the court may not go outside of the record and outside of judicial notice to supply defects in the record before it.

In relation to the first point that the record must affirmatively show jurisdiction, this Court said in *Lehigh Mining & Manufacturing Co. v. Kelly* (1895), 160 U. S. 327, 337:

> "But * * * when the inquiry involves the jurisdiction of a Federal court,—the presumption in every stage of a cause being that it is without the jurisdiction of a court of the United States, unless the contrary appears from the record * * *"

Again in *Ex parte Smith* (1877), 94 U. S. 455, this Court said:

> "The facts upon which the jurisdiction of the courts of the United States rests must, in some form, appear in the record of all suits prosecuted before them. *To this rule there are no exceptions.*
>
> "* * * There are no presumptions in favor of the jurisdiction of the courts of the United States."

See also *United States v. Green* (1939), 107 Fed. (2d) 19, 22, where the Court stated:

> "The District Courts of the United States are courts of limited jurisdiction, and the presumption at every stage of a cause is that the cause is outside the jurisdiction of a court of the United States unless the contrary appears from the record."

The case before this Court is not merely one where the record is silent or creates a conflict as to jurisdiction. It is one where the evidence in the record affirmatively established that the United States District Court had no jurisdiction.

In relation to the second point as to the right of the court to go outside of the record and judicial notice this Court and the various Circuit Courts of Appeals have been uniform to the effect that this may not be done. In *White v. Central Dispensary and Emergency Hospital* (1938), 99 Fed. (2d) 355, the court said:

> "And a court of appeals cannot take judicial notice of what may appear upon the records of the subordinate courts within the boundaries of its judicial jurisdiction; it can act only upon the facts appearing in the record before it. Fitzgerald v. Evans, 8 Cir., 49 F. 426, 1892; In re Manderson, 3 Cir., 51 F. 501, 1892; Divide Creek Irrigation Dist. v. Hollingsworth, 10 Cir., 72 F. 2d 859, 96 A. L. R. 937, 1934; Bush v. Tecumseh Nat. Bank, 64 Neb. 451, 90 N. W. 236, 1902."

An examination of the opinions of this Court has not revealed a single instance where the Court has considered the records of proceedings in lower courts unless the same were contained in the record. See *West Ohio Gas Co. v. Public Utilities Commission,* 294 U. S. 63. Also to the same effect, that an Appellate Court must restrict itself to the record, see *Pilger v. Sutherland,* 57 Fed. (2d) 604; *Chisholm-Ryder Co. v. Buck,* 65 Fed. (2d) 735.

In the instant case the United States Circuit Court of Appeals indicated that it obtained its extra record information from the briefs, at the same time acknowledging that this material was not in the record on appeal. (R. 182.) This is directly contrary to the determinations of other Circuits. See *Morris v. District of Columbia,* 124 Fed. (2d) 284. It is difficult to con-

ceive of a more dangerous practice on the part of an Appellate Court.

In brief the opinion of the Circuit Court of Appeals in this case is in conflict with the decisions of other circuits and with the determinations of this Court in that it indulges in presumptions not within judicial notice to sustain jurisdiction. This is, regardless of the other points made in this brief, such a departure from the usual and accepted course of judicial procedure as to call for intervention and control by this Court. If judicial review is to maintain any semblance of rationality and is not to be allowed to degenerate into determinations based upon assumption, surmise and conjecture, certiorari must be granted.

In conclusion it is emphasized that all of the argument here presented is concerned with two of the most important objectives of government: first, the proper administration of justice and, secondly, the preservation of civil liberties guaranteed by the Constitution of the United States. In this case the United States Circuit Court of Appeals has affirmed a judgment arising out of a hearing which did not follow the accepted principles of judicial procedure and in which petitioner was denied the constitutional guaranties of due process. Because of this, and because of the importance of the questions generally in the administration of justice in the federal courts, a review by certiorari should be granted.

(e) PRAYER.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record in all proceedings in the case numbered and entitled on its docket "No. 10,439, Russell G. Smith, Appellant, v. L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Appellee", and that the said decree of the said United States Circuit Court of Appeals for the Ninth Circuit be reversed by this Honorable Court and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

Dated, San Francisco, California,
March 1, 1944.

Respectfully submitted,
LOUIS FERRARI,
G. D. SCHILLING,
PHILIP S. EHRLICH,
Attorneys for Petitioner.

KENNETH M. JOHNSON,
Of Counsel.

In the Supreme Court

OF THE

United States

Office - Supreme Court, U. S.
FILED
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CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1943

No. 764

ALFRED FENTON,
Petitioner (Appellant Below),
vs.
L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor,
Respondent (Appellee Below).

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1943

No.

ALFRED FENTON,
Petitioner (Appellant Below),
vs.
L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor,
Respondent (Appellee Below).

PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Alfred Fenton petitions that a writ of certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered and filed on December 30, 1943, in a cause pending in

that Court numbered and entitled, "No. 10,438, Alfred Fenton, Appellant, vs. L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Appellee". (R. 198.) Said judgment affirmed an order of the United States District Court for the Northern District of California, Southern Division, adjudging petitioner to be guilty of contempt and committing him to the custody of the United States Marshal until he should purge himself thereof. Said judgment and decision of the United States Circuit Court of Appeals is not yet reported but should appear in 139 Fed. 2d. The decision appears in the record of this case at page 198.

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

In the United States District Court for the Northern District of California, Southern Division, a complaint was filed by the Administrator of the Fair Labor Standards Act of 1938, plaintiff, against the Bank of America National Trust and Savings Association, defendant, seeking an injunction enjoining the defendant from violating the provisions of said Act. (R. 2, 47.) The petitioner herein was not a party to the suit in the United States District Court, and the complaint in that case was not in the record on appeal to the United States Circuit Court of Appeals.[1]

---

[1] In this connection the United States Circuit Court in a footnote to its decision stated:

"The records on appeal do not contain the complaint or the Bank's answer, and what is said here in respect of the condition of the pleadings is obtained from the briefs." (R. 199.)

In the suit in the United States District Court the plaintiff therein proceeded to take the deposition of petitioner who was an officer of the defendant bank but not a party to the suit. (R. 2.) Petitioner after answering certain questions declined to answer others. (R. 5.) An order was obtained directing petitioner to answer and he again failed to answer. (R. 39, 43.) Thereafter upon application an order to show cause was issued against petitioner directing him to show cause, if any he might have, why he should not be held in contempt of court for failure to answer the questions propounded. (R. 45.) To this order to show cause petitioner filed a verified return in which he alleged as a matter of fact that the District Court had no jurisdiction of the subject matter because the defendant bank had no employees engaged in interstate commerce. (R. 47.) A hearing was held in the District Court and upon the mere showing that petitioner had so failed to testify he was found to be in civil contempt of court and was directed to be placed in the custody of the United States Marshal. (R. 112, 140, 164, 167.) Petitioner was released on his own recognizance pending appeal.

Petitioner appealed to the United States Circuit Court of Appeals for the Ninth Circuit, and that court affirmed the judgment of contempt of the lower court. (R. 205.) The Circuit Court stated that jurisdiction in the separate contempt proceeding was sustained by allegations in the complaint in the principal cause which was not in the record on appeal and to which petitioner was not a party. (R. 203, 204.)

II.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is invoked under Section 240, Subdivision (a) of the Judicial Code. (28 USCA, Section 347a.) Cases sustaining the jurisdiction of this Court are *McCrone v. United States* (1939), 307 U. S. 61, and *Nye v. United States,* 313 U. S. 33.

The decision and judgment of the United States Circuit Court of Appeals was entered and filed on December 30, 1943. On January 27, 1944, a petition for rehearing was filed which was denied on February 1, 1944.

III.

THE QUESTIONS PRESENTED.

This case presents the following questions:

(1) Whether in civil contempt proceedings the constitutional guaranties of due process must be observed.

(2) Whether a United States District Court can legally find a person guilty of contempt of court where the record before said court affirmatively establishes that said court is acting without jurisdiction.

(3) Whether a determination by a United States Circuit Court of Appeals affirming a judgment of contempt by a United States District Court is subject to review in this court where such judgment is clearly erroneous and there is no evidence in the record to support it.

(4) Whether a United States Circuit Court of Appeals may affirm a conviction for contempt by a United States District Court where the evidence and the record affirmatively establish without conflict that the District Court had no jurisdiction.

(5) Whether a United States Circuit Court of Appeals in affirming a judgment of the United States District Court which is not supported by any evidence in the record may resort to matters not a part of the record and not within judicial notice.

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

This case presents important and serious questions in the administration of justice in the federal courts. The case squarely presents the issue of whether a witness, or third person, brought into a case to which he is not a party is entitled in a contempt proceeding to the constitutional guaranties of due process prior to being deprived of his liberty. The record in the contempt proceeding affirmatively showed the United States District Court to be without jurisdiction; nevertheless, the District Court proceeded to find petitioner guilty and to punish him. This directly violates the due process provisions of the Federal Constitution. A review on writ of certiorari should be granted because the United States Circuit Court of Appeals has affirmed a decision probably in conflict with the appli-

cable decisions of this Court. (*Hovey v. Elliott,* 167 U. S. 409; *Cooke v. U. S.,* 267 U. S. 517.)

Certiorari should also be granted because the United States Circuit Court by its decision has sanctioned a departure by the lower court from the accepted and usual course of judicial proceedings in that it has sanctioned a procedure in which an individual is deprived of liberty without conformance to the most elemental concepts of due process. (*Mooney v. Holohan,* 294 U. S. 103.)

Further, the United States Circuit Court has departed from the accepted and usual course of judicial procedure in affirming a judgment of the District Court, which is a court of limited jurisdiction, where the record affirmatively establishes lack of jurisdiction. It should be emphasized that this is not a case of conflicting evidence, but a case where *the only evidence in the record* shows no jurisdiction. In this regard the decision of the United States Circuit Court of Appeals for the Ninth Circuit is contra to the decisions of other Circuits and of this Court which hold that a federal Court is one of limited jurisdiction and that jurisdiction is never presumed. On the contrary it is held that the Court is without jurisdiction unless such affirmatively appear from the record. Certiorari is required because this point arises in a case where personal liberty is directly concerned. (*Ex parte Smith,* 94 U. S. 455.)

In addition the United States Circuit Court departed from the accepted and usual course of judicial proceedings in that it affirmed a judgment of the United States District Court through resort to assumed facts not within judicial notice and not found in the record. In this regard the decision of the Circuit Court of Appeals is again in conflict with the decisions of other circuits and with the applicable decisions of this Court. (*White v. Central Dispensary and Emergency Hospital,* 99 Fed. (2d) 355; *West Ohio Gas Co. v. Public Utilities Commission,* 294 U. S. 63.) The case directly presents a most serious question in the administration of justice, i.e., to what extent when individual liberty is at stake may a reviewing court go beyond the record and judicial notice to support a judgment.

Wherefore, petitioner prays that this Court issue its writ of certiorari directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings in the cause numbered and entitled in said Court "No. 10,438, Alfred Fenton, Appellant, v. L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Appellee", to the ends that said cause may be reviewed by this Court as provided by law; that said judgment of said Circuit Court of Appeals be reversed and that your

petitioner have such other and further relief in the premises as this Court may deem proper.

Dated, San Francisco, California,
March 1, 1944.

Respectfully submitted,
LOUIS FERRARI,
G. D. SCHILLING,
PHILIP S. EHRLICH,
Attorneys for Petitioner.

KENNETH M. JOHNSON,
Of Counsel.

CERTIFICATE OF COUNSEL.

The foregoing petition for writ of certiorari together with the hereinafter contained supporting brief, is well founded in point of fact and law, is presented in good faith, and is not interposed for delay.

Dated, San Francisco, California,
March 1, 1944.

LOUIS FERRARI,
Of Counsel for Petitioner.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1943

No.

ALFRED FENTON,
Petitioner (Appellant Below),

vs.

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor,
Respondent (Appellee Below).

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS BELOW.

The opinion below, 139 Fed. (2d) ....., is not yet reported but appears in the record of this case at page 198.

II.

JURISDICTION.

The jurisdiction of this Court to review upon writ of certiorari a final determination of a United States Circuit Court of Appeals is set forth in the preceding petition for the writ which statement is here adopted as the statement as to jurisdiction and is therefore not repeated.

III.

STATEMENT OF THE CASE.

The material facts are set forth and the nature of the case is stated in the foregoing petition for a writ under the heading "Summary Statement of the Matter Involved". This statement is here adopted as the statement of the case and is therefore not here repeated.

IV.

SPECIFICATIONS OF ERROR.

The Circuit Court of Appeals committed error in the following respects:

1. In affirming a judgment of the United States District Court which deprived petitioner of his liberty and which denied to petitioner the constitutional guaranties of due process.

2. In affirming a judgment of the United States District Court where the only evidence in the record

affirmatively established that Court to be without jurisdiction.

3. In affirming the judgment of the United States District Court by resorting to material not in the record before the said United States Circuit Court of Appeals and not within judicial notice.

V.

ARGUMENT.

(a) SUMMARY OF ARGUMENT.

Petitioner's argument in brief is as follows:

1. The deprivation of personal liberty by a Court having no jurisdiction, and where the record shows the Court to be without jurisdiction, is a denial of due process under the Constitution of the United States.

2. It is not contempt to violate an order which the court had no jurisdiction to issue.

3. Jurisdiction of the federal courts cannot be presumed and particularly cannot be sustained through the use of material not within judicial notice and outside of the record.

(b) THE DEPRIVATION OF PERSONAL LIBERTY BY A COURT HAVING NO JURISDICTION, AND WHERE THE RECORD SHOWS THE COURT TO BE WITHOUT JURISDICTION, IS A DENIAL OF DUE PROCESS UNDER THE CONSTITUTION OF THE UNITED STATES.

The requirement of due process in judicial proceedings is not only specifically set forth in the Fifth Amendment to the Constitution, but is inherent in the jurisprudence of the United States. The general principles have been stated by this Court and other courts many times. The expression "due process of law" means that there can be no proceeding against liberty or property which may result in the deprivation of either without the observance of those general rules established in our system of jurisprudence for the security of private rights. (*Turpin v. Lemon,* 187 U. S. 51; *Endicott-Johnson Corp. v. Ency. Press,* 266 U. S. 285.) One of the most settled rules in the administration of justice in the United States is that any judgment must be supported by proof. (*The Hoppet v. United States,* 7 Cranch 389; *Lancaster v. Collins,* 115 U. S. 222.) This Court has on several occasions asserted another fundamental, i.e., that the Court determining the cause must have jurisdiction. (*Scott v. McNeal,* 154 U. S. 34; *Twining v. New Jersey,* 211 U. S. 78.)

In the case before this Court petitioner was cited on a charge of contempt arising out of his failure to testify on deposition in a cause to which he was not a party. A separate proceeding to determine the alleged contempt of petitioner was instituted. In response to the order to show cause, petitioner filed a

verified return in which he alleged under oath certain facts which affirmatively established no jurisdiction in the District Court to issue the order which it was alleged that petitioner had not obeyed.

Petitioner in his return alleged under oath that the defendant bank, in the action to which he was not a party, had no employees engaged in interstate commerce. (R. 47.) As the principal action involved the Fair Labor Standards Act of 1938, this was the critical element as to the jurisdiction of the District Court. If true, the court had no jurisdiction as the application of the Act is dependent on the character of the employees' activities. (*Kirschbaum v. Walling,* 316 U. S. 517; *Walling v. Jacksonville Paper Co.,* 317 U. S. ....., 87 L. ed. Adv. 393.) The United States District Court disregarded entirely the evidence establishing no jurisdiction and no findings were made thereon. On a mere showing that petitioner had not complied with the order previously issued by the District Court and in face of his return showing no jurisdiction, he was declared to be in contempt and placed in custody for an indefinite period of time.

This Court has on various occasions defined in detail what it will require to satisfy the mandate of due process found in the Constitution. Minimum requirements are that the Court have jurisdiction and that judgment comply with proof. In general the language of this Court in *St. Joseph Stock Yards Co. v. United States* (1935), 298 U. S. 38, 77, is particularly pertinent. Here the Court said:

> "The first distinction is between issues of law and issues of fact. When dealing with constitutional rights (as distinguished from privileges accorded by the government * * *) there must be the opportunity of presenting in an appropriate proceeding, at some time, to some court, every question of law raised, whatever the nature of the right invoked or the status of him who claims it. The second distinction is between the right to liberty of person and other constitutional rights * * * A citizen who claims that his liberty is being infringed is entitled, upon habeas corpus, to the opportunity of a judicial determination of the facts. And, so highly is this liberty prized that the opportunity must be accorded to any resident of the United States who claims to be a citizen."

Again in *Hovey v. Elliott* (1897), 167 U. S. 409, 414, this Court restated the fundamental requirements of due process:

> "Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. * * * A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, Appear and you shall be heard; and, when he has ap-

> peared, saying, Your appearance shall not be recognized, and you shall not be heard. In the present case, the district court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict clothed in the form of a judicial sentence."

The language in the above case applies directly to petitioner. The United States District Court said to petitioner, there shall be a hearing but there will be no consideration of evidence establishing no jurisdiction. The Circuit Court of Appeals has said there is a right of appeal, but on such appeal we will not consider whether the United States District Court was correct in ignoring the uncontradicted evidence which established the want of jurisdiction. The naked right of appeal is of no value unless at least the Appellate Court is willing to review and consider whether at least the fundamental elements of due process have been complied with. A case directly in point is *Cooke v. United States* (1925), 267 U. S. 517, 537, where this Court said:

> "Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and

in mitigation of the penalty to be imposed. See Hollingsworth v. Duane, Wall. Sr. 77, Fed. Cas. No. 6,616; Re Stewart, 118 La. 827, 43 So. 455; Re Clark, 208 Mo. 121, 15 L. R. A. (N.S.) 389, 106 S. W. 990.

"The proceeding in this case was not conducted in accordance with the foregoing principles. * * *

"The court proceeded on the theory that the admission that the petitioner had written the letter foreclosed evidence or argument. In cases like this where the intention with which acts of contempt have been committed must necessarily and properly have an important bearing on the degree of guilt and the penalty which should be imposed, the court cannot exclude evidence in mitigation. It is a proper part of the defense."

This Court in the *Cooke* case, which is one involving contempt, has directly stated that matters going to defense must be considered and that if there is an excuse the mere admission of noncompliance with an order is not sufficient to justify the commitment for contempt.

The plain unvarnished fact is that the record shows without conflict a complete defense which the Court ignored. This even under the most limited concept of the guaranties of our Constitution is lack of due process. In *Mooney v. Holohan* (1935), 294 U. S. 103, 112, this Court said:

"* * * the Attorney General contends that 'it is only where an act or omission operates so as to deprive a defendant of notice or so as to deprive him of an opportunity to present such evidence

as he has, that it can be said that due process of law has been denied'.

"Without attempting at this time to deal with the question at length, we deem it sufficient for the present purpose to say that we are unable to approve this narrow view of the requirement of due process. That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions."

Regardless of the fact that two courts have found petitioner to be guilty of contempt, the question is properly open for review by this Court because the record discloses without conflict that the judgment is erroneous. In *District of Columbia v. Pace* (Jan. 10, 1944), ... U. S. ....., Justice Jackson of this Court stated the rule as follows:

"when two courts have reached the same conclusion on a question of fact, their finding will not be disturbed unless it is clear that their conclusion was erroneous."

This is not a case involving a conflict of evidence or the weight thereof; it is a case where jurisdiction is conditioned upon certain facts and where the *sole evidence* as to said facts affirmatively established the lack of jurisdiction of the United States District Court.

The decision in this case is not only in absolute conflict with the decisions of this Court but is also of the utmost importance in the administration of justice because unless reversed it opens the doors in private

litigation to a situation where one may be placed in jail for an indefinite period without an opportunity to challenge the jurisdiction of the court so committing. This is not only shocking, it is unthinkable in the United States as of today; it is a reversion to the Star Chamber methods of the remote past. Certiorari is necessary to prevent a whittling away by judicial acquiescence of rights which we are now at war to preserve.

(c) IT IS NOT CONTEMPT TO VIOLATE AN ORDER WHICH THE COURT HAD NO JURISDICTION TO ISSUE.

That the question of jurisdiction of the United States District Court was of paramount importance and proper to be raised by petitioner in his defense is clear. This Court has time and time again stated that if the order disobeyed is issued by a court without jurisdiction, a judgment of contempt for failure to comply is void. In *Ex parte Sawyer* (1887), 124 U. S. 200, 222, this Court said:

> "The circuit court being without jurisdiction to entertain the bill in equity for an injunction, all its proceedings in the exercise of the jurisdiction which it assumed are null and void. The restraining order, in the nature of an injunction, it had no power to make. The adjudication that the defendants were guilty of a contempt in disregarding that order is equally void; their detention by the marshal under that adjudication is without authority of law, and they are entitled to be discharged. *Ex parte Rowland,* 104 U. S. 604 [26:861]; *Ex parte Fisk,* 113 U. S. 713 [28:1117] * * *"

The *Sawyer* case is essentially similar to that of petitioner. Petitioner in a proceeding for an injunction failed to comply with a preliminary order in that suit to which he was not a party and presented uncontradicted evidence showing the United States District Court to be without jurisdiction. Under the *Sawyer* case this was a complete defense. Under the requirements of due process petitioner was entitled to make this defense which was ignored by the United States District Court. This improper action was affirmed by the United States Circuit Court of Appeals.

In *Ex parte Fisk* (1885), 113 U. S. 713, 718, the Court said:

> "When, however, a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, *the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void.*"

In *Beauchamp v. United States* (1935), 76 Fed. (2d) 663, 668, the Court said:

> "In order that disobedience of this injunction order may constitute contempt, it is necessary that the order be valid. Disobedience of a void mandate, order, judgment, or decree, or one issued by a court without jurisdiction of the subject-matter and parties litigant, is not contempt.
>
> "When '* * *' a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the

order punishing for the contempt is equally void. * * *' Ex parte Fisk, 113 U. S. 713, 5 S. Ct. 724, 726, 28 L. Ed. 1117; Ex parte Terry, 128 U. S. 289, 9 S. Ct. 77, 32 L. Ed. 405; In re Ayers, 123 U. S. 443, 8 S. Ct. 164, 31 L. Ed. 216."

See also

Western Fruit Growers v. Gotfried (1943), 136 Fed. (2d) 98.

This principle is also expressly stated in the applicable statutes. Section 268 of the Judicial Code (28 USCA 385) defines the situations where the District Courts have power in relation to contempt. This section expressly limits the power to punish for disobedience of orders or decrees to *lawful* orders, rules or decrees and reads in part as follows:

"The said courts shall have power to * * * punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except * * * the disobedience or resistance * * * to any lawful writ, process, order, rule, decree, or command of the said courts."

Even where the proceeding is before a Senate Investigating Committee, which in its duty to determine facts for the purpose of evaluating proposed legislation must have broad powers, the same rule is applied. In *Sinclair v. United States* (1928), 279 U. S. 263, 292, this Court said:

"it must be exerted with due regard for the rights of witnesses, and that a witness rightfully

> may refuse to answer where the bounds of the power are exceeded or where the questions are not pertinent to the matter under inquiry."

In summary a complete defense to a charge of contempt is the establishment of the lack of jurisdiction of the court to issue the order which it is alleged that the contemnor has failed to obey. In the record of this case, involving petitioner, the lack of jurisdiction is affirmatively established without contradiction.

It should be emphasized that the case before this Court involves private litigation and is thus not similar to that of a grand jury where it has been said that because of the plenary investigative powers of the grand jury a witness may not challenge the authority of such grand jury. (*Blair v. United States,* 250 U. S. 273.)

(d) **JURISDICTION OF THE FEDERAL COURTS CANNOT BE PRESUMED AND PARTICULARLY CANNOT BE SUSTAINED THROUGH THE USE OF MATERIAL NOT WITHIN JUDICIAL NOTICE AND OUTSIDE OF THE RECORD.**

As already indicated, uncontradicted allegations of fact in a verified return filed in the United States District Court affirmatively established lack of jurisdiction. In order to sustain the jurisdiction of the District Court to sentence petitioner for contempt the United States Circuit Court of Appeals ignored the record on appeal and stated that jurisdiction was sustained because of assumed allegations in an assumed complaint in the principal cause out of which the contempt arose, to which petitioner was not a party.

The Circuit Court first states that petitioner is not a party to the principal cause, admits that the lack of jurisdiction was shown in the contempt proceeding, and then sustains jurisdiction in the contempt proceeding by reliance upon the complaint in the principal cause which was not in the record and to which petitioner was not a party. (R. 199, 203, 204.) This departure from customary judicial procedure can be no better illustrated than by comparing the two statements found in the opinion of the Circuit Court and set forth below:

> *"These individual contemnors are not parties to the main cause.* They have no appeal from the final judgment to be entered in it, and unless they can obtain a review of the orders now they will have no right of review at all. As to them the commitment orders are final."

> "Their argument (appellants') is that the answers in the contempt proceeding (alleging that no employees of the Bank were engaged in interstate commerce) were not controverted in that proceeding, hence the court was shown to be without jurisdiction. *But the court's jurisdiction was to be determined, not by reference to what appellants might assert, but by reference to the complaint."*

(R. 203, 204; emphasis supplied.)

In this connection the determination of the United States Circuit Court of Appeals is contrary to the prior decisions of this Court and in conflict with the decisions in other circuits in two regards: First: Jurisdiction will never be presumed; secondly, the court may not go outside of the record and outside of judicial notice to supply defects in the record before it.

In relation to the first point that the record must affirmatively show jurisdiction, this Court said in *Lehigh Mining & Manufacturing Co. v. Kelly* (1895), 160 U. S. 327, 337:

> "But * * * when the inquiry involves the jurisdiction of a Federal court,—the presumption in every stage of a cause being that it is without the jurisdiction of a court of the United States, unless the contrary appears from the record * * *"

Again in *Ex parte Smith* (1877), 94 U. S. 455, this Court said:

> "The facts upon which the jurisdiction of the courts of the United States rests must, in some form, appear in the record of all suits prosecuted before them. *To this rule there are no exceptions.*
>
> "* * * There are no presumptions in favor of the jurisdiction of the courts of the United States."

See also *United States v. Green* (1939), 107 Fed. (2d) 19, 22, where the Court stated:

> "The District Courts of the United States are courts of limited jurisdiction, and the presumption at every stage of a cause is that the cause is outside the jurisdiction of a court of the United States unless the contrary appears from the record."

The case before this Court is not merely one where the record is silent or creates a conflict as to jurisdiction. It is one where the evidence in the record affirmatively established without contradiction that the United States District Court had no jurisdiction.

In relation to the second point as to the right of the court to go outside of the record and judicial notice this Court and the various Circuit Courts of Appeals have been uniform to the effect that this may not be done. In *White v. Central Dispensary and Emergency Hospital* (1938), 99 Fed. (2d) 355, the court said:

> "And a court of appeals cannot take judicial notice of what may appear upon the records of the subordinate courts within the boundaries of its judicial jurisdiction; it can act only upon the facts appearing in the record before it. Fitzgerald v. Evans, 8 Cir., 49 F. 426, 1892; In re Manderson, 3 Cir., 51 F. 501, 1892; Divide Creek Irrigation Dist. v. Hollingsworth, 10 Cir., 72 F. 2d 859, 96 A. L. R. 937, 1934; Bush v. Tecumseh Nat. Bank, 64 Neb. 451, 90 N. W. 236, 1902."

An examination of the opinions of this Court has not revealed a single instance where the Court has considered the records of proceedings in lower courts unless the same were contained in the record. See *West Ohio Gas Co. v. Public Utilities Commission,* 294 U. S. 63. Also to the same effect, that an Appellate Court must restrict itself to the record, see *Pilger v. Sutherland,* 57 Fed. (2d) 604; *Chisholm-Ryder Co. v. Buck,* 65 Fed. (2d) 735.

In the instant case the United States Circuit Court of Appeals indicated that it obtained its extra record information from the briefs, at the same time acknowledging that this material was not in the record on appeal. (R. 199.) This is directly contrary to the determinations of other Circuits. See *Morris v. District of Columbia,* 124 Fed. (2d) 284. It is difficult to con-

ceive of a more dangerous practice on the part of an Appellate Court.

In brief the opinion of the Circuit Court of Appeals in this case is in conflict with the decisions of other circuits and with the determinations of this Court in that it indulges in presumptions not within judicial notice to sustain jurisdiction. This is, regardless of the other points made in this brief, such a departure from the usual and accepted course of judicial procedure as to call for intervention and control by this Court. If judicial review is to maintain any semblance of rationality and is not to be allowed to degenerate into determinations based upon assumption, surmise and conjecture, certiorari must be granted.

In conclusion it is emphasized that all of the argument here presented is concerned with two of the most important objectives of government: first, the proper administration of justice and, secondly, the preservation of civil liberties guaranteed by the Constitution of the United States. In this case the United States Circuit Court of Appeals has affirmed a judgment arising out of a hearing which did not follow the accepted principles of judicial procedure and in which petitioner was denied the constitutional guaranties of due process. Because of this, and because of the importance of the questions generally in the administration of justice in the federal courts, a review by certiorari should be granted.

(e) PRAYER.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record in all proceedings in the case numbered and entitled on its docket "No. 10,438, Alfred Fenton, Appellant, v. L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Appellee", and that the said decree of the said United States Circuit Court of Appeals for the Ninth Circuit be reversed by this Honorable Court and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

Dated, San Francisco, California,
March 1, 1944.

Respectfully submitted,
PHILIP S. EHRLICH,
LOUIS FERRARI,
G. D. SCHILLING,
Attorneys for Petitioner.

KENNETH M. JOHNSON,
Of Counsel.

Due service and receipt of a copy of the within is hereby admitted

this.....*day of March, 1944.*

.....

Acting Solicitor United States Department of Labor,
Wage and Hour Division,

.....

Acting Solicitor United States Department of Labor,
Wage and Hour Division,
Attorneys for Respondent.

Office - Supreme Court, U. S.
FILED
MAR 28 1944
CHARLES ELMORE CROPLEY
CLERK

Nos. 764 and 765

In the Supreme Court of the United States

OCTOBER TERM, 1943

ALFRED FENTON, PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

RUSSELL G. SMITH, PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the circuit court of appeals (R. S. 181; R. F. 198)[1] is reported in 139 F. (2d) 608. The District Court wrote no opinion.

[1] The symbol (R. F.) refers to the Fenton record and the symbol (R. S.) to the Smith record.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 30, 1943 (R. S. 188; R. F. 205). The petitions for certiorari were filed March 6, 1944. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether the district court had power to adjudge petitioners, who were witnesses called upon to testify and produce documents in a suit brought by the Administrator of the Wage and Hour Division against a bank, guilty of contempt without requiring proof that the bank had employees covered by the Fair Labor Standards Act.

2. Whether it was necessary for the record on appeal [2] in the contempt proceeding to show that the District Court had jurisdiction over the action in which the orders disobeyed were issued, and if so whether there was a sufficient showing of such jurisdiction in the record on appeal to warrant affirmance of the contempt orders.

STATEMENT

On March 24, 1942, the Administrator of the Wage and Hour Division, United States Department of Labor, instituted an action against the Bank of America National Trust and Savings

[2] The District Court, of course, had the complaint and all other pleadings in the action against the Bank before it when the orders in question were issued.

Association, under Section 17 of the Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201 *et seq.*) to restrain violations of the overtime and record-keeping provisions of said Act. The petitioners are officers and managing agents of the defendant bank, hereinafter referred to as the bank. Petitioner Smith is executive vice-president charged with the general administrative supervision and management of the bank, subject to the direction of the bank's president and board of directors (R. S. 96–97). Petitioner Fenton is a vice-president and chairman of the operating committee of the bank; he had been for ten years its personnel director (R. F. 114).

In the course of preparing the case for trial, respondent served notice on the bank that the deposition of Fenton, by oral examination, would be taken on August 17, 1942, and the witness was subpoenaed to appear and testify (R. F. 168). Fenton appeared as directed by the subpoena, represented by counsel for the bank (R. F. 4–38, 168). During the course of the deposition, petitioner Fenton was questioned concerning the hours worked by and the compensation paid to the bank's employees, and the nature of the wage and hour records kept. Counsel for the bank instructed Fenton not to answer these questions, and he accordingly refused to answer (R. F. 4–38).

Respondent, by motion filed September 30, 1942, applied to the District Court, pursuant to

Rule 37 (a) of the Federal Rules of Civil Procedure, for an order compelling Fenton to answer the questions (R. F. 2–3, 168). After a full hearing, the court by order dated October 13, 1942, directed Fenton to answer (R. F. 39, 168). Pursuant to this order Fenton appeared at the time and place directed by the court, and the questions which he had previously refused to answer were again propounded. Fenton again, upon advice of counsel, refused to answer any of the questions except one (R. F. 115–117, 169).

Meanwhile, on September 29, 1942, respondent, pursuant to Rule 34 of the Federal Rules of Civil Procedure, served on the bank and filed with the District Court, a motion for an order directing the bank to produce, and to permit respondent to inspect and copy, specified documents concerning the hours worked by and the compensation paid to the bank's employees (R. S. 2–6, 156). After hearing this motion, the court by order dated October 13, 1942, required the bank to produce and permit the respondent, his agents and attorneys, to inspect and copy the documents referred to, at the bank's main office, on a fixed date (R. S. 10–14, 156). On the date designated by the court, a request was made by the duly authorized representative of the respondent for production of the specified documents. Petitioner Smith, being aware of the order, and having the power and authority to comply therewith, re-

fused to produce the documents or take appropriate action for obedience thereto (R. S. 99).

On January 16, 1943, respondent instituted contempt proceedings in the District Court against Smith and Fenton, under Rule 37 (b) of the Federal Rules of Civil Procedure (R. S. 15–20; R. F. 41–44). The contempt proceedings were heard on February 15, March 3, and March 10, 1943 (R. S. 57, 149; R. F. 69, 166). At the conclusion of the hearings, the District Court found that the failure of the petitioners to obey the orders of October 13, 1942, "impaired, defeated, impeded, and prejudiced the rights and remedies" of the respondent and constituted civil contempt. The court accordingly denied motions to quash the orders to show cause (R. S. 55, 152; R. F. 68, 164), and directed that petitioners be imprisoned until they should comply with the court's orders (R. S. 155–161; R. F. 167–177). Upon petitioners' motions, the orders of commitment were stayed pending appeal (R. S. 153; R. F. 165).

Petitioners had based their refusals to obey the orders to testify and produce records upon assertions that none of the Bank's employees was within the coverage of the Fair Labor Standards Act and that therefore the court lacked jurisdiction to issue the orders. In the contempt proceeding, petitioners contended that the court would have jurisdiction to punish them for disobedience of its orders only if respondent proved that the Bank had employees who were covered

by the Act. In the Circuit Court of Appeals, petitioners contended that, because respondent had offered no such proof, the District Court's judgments committing them for contempt were erroneous and should be reversed. Relying upon averments in their verified returns to the orders to show cause, petitioners asserted that the only evidence in the record showed that the Bank had no employees who were covered by the Act; they contended that therefore the record affirmatively established that the District Court lacked jurisdiction.

The Circuit Court of Appeals held that it was clear that the District Court had jurisdiction of an action under Section 17 of the Fair Labor Standards Act and "was possessed of authority to order the production of documents and the answering of questions bearing upon any of the issues embraced within the pleadings" filed in such action; that the court's authority in the contempt proceeding was determined by its jurisdiction in the main action and not by the assertions in the answers in the contempt proceeding; and that it was not open to petitioners in the contempt proceeding to raise or have determined the issues involved in the main case (R. S. 187; R. F. 203–204). The Circuit Court accordingly affirmed the orders of commitment (R. S. 188; R. F. 205).[3]

[3] The Administrator, in the Court of Appeals, also argued that petitioners were not strangers to the main action but in

ARGUMENT

The authority of the court to order petitioners to produce records and to testify in proceedings before trial, and to commit them for contempt if they failed to do so, was clearly granted by Rules 26, 34 and 37 of the Federal Rules of Civil Procedure. Petitioner's argument is premised upon a misapprehension concerning the grounds upon which a witness may excuse his refusal to obey an order of the court to produce evidence or to testify, and also upon a misconception of the nature and scope of the court's authority or "jurisdiction" to commit for contempt.

1. Petitioners' sole ground for disobeying the orders to testify was the alleged lack of jurisdiction[1] of the District Court because, as claimed by petitioners, none of the Bank's employees was engaged in commerce or in the production of goods for commerce within the meaning of the Act. This same defense had previously been made by the Bank in a motion to dismiss the main ac-

fact represented the party defendant, and therefore the orders of commitment were interlocutory and were reviewable only on appeal from the final decree in the main action. The Court of Appeals rejected this contention, however, ruling that the officers of defendant corporation were not parties to the main action, but were individual contemnors (R. F. 203).

[1] Petitioners' misconception of the meaning of "jurisdiction" in this context is pointed out *infra*, pages 9–13.

tion (R. F. 67), which motion had been denied (R. F. 9).[5]

The court below was clearly correct in ruling that it was not within the province of petitioners, when called upon to testify as witnesses, to raise such an issue. The grounds on which a witness may take exception to a court order requiring the production of evidence or answering of questions are not co-extensive with the defenses available to the parties to the action, but are limited to the personal rights and privileges of the witness. *Nelson* v. *United States,* 201 U. S. 92, 115; *Blair* v. *United States,* 250 U. S. 273, 282–283. This Court, in affirming a contempt judgment in the *Nelson* case, held that it is not open to a witness ordered to testify "to make objections to the testimony" since "the tendency or effect of the testimony on the issues between the parties is no concern of theirs. The basis of their privilege is different from that and entirely personal * * *." See also *Fairfield* v. *United States,* 146 Fed. 508, 509 (C. C. A. 8); *Levinstein* v. *E. I. DuPont De Nemours & Co.,* 258 Fed. 662, 665. Were witnesses free to raise other issues

[5] By reiterating this defense in the contempt proceedings, petitioners sought to force the court to follow an order of proof which it had refused to follow in denying the motion to dismiss, that is, to try the question of coverage separately and in advance of the issue of compliance. If petitioners were correct in their contention, witnesses would thus be in a position to take out of the court's hands the determination of the order of proof and the course of the trial.

such as those asserted here by petitioners, endless delay and confusion would result,[6] the witnesses and not the court would control the conduct of the trial, and an orderly trial would be impossible. The exceptions taken by petitioners to the contempt orders in the instant case relate to the issues and the merits in the main action between the Administrator and the bank; the objections are not based upon any privilege or right personal to petitioners, and therefore cannot operate to void the contempt orders.

Even if petitioners are correct in characterizing their objections as "jurisdictional," they are not entitled to raise such an issue. In *Blair* v. *United States, supra,* this Court stated that in the ordinary case it is "no concern of one summoned as a witness whether the offense is within the jurisdiction of the court or not" (250 U. S. at 282). But, as pointed out below, the grounds upon which petitioners have attacked the contempt orders involve the merits of the main action and not the jurisdiction of the court.

2. Even if it were open to petitioners to question the court's jurisdiction, the defense that the Act was inapplicable did not go to the court's jurisdiction but to the merits of the main action. The

[6] In the instant case petitioners' persistent refusal to give any evidence or to produce the records of the Bank has already delayed the trial for considerably more than a year, the orders of the court directing petitioners to testify and produce records having been issued on October 13, 1942.

decisions upon which petitioners rely (*Ex parte Sawyer*, 124 U. S. 200, *Ex parte Fisk*, 113 U. S. 713, and other cases cited in their brief, pp. 18–20)[7] involved "lack of jurisdiction" in the sense that the court had no power to act, so that any orders issued by it were void. It is clear that the denial that the Act was applicable to the Bank's employees did not involve the jurisdiction of the court in this sense. The authorities consistently hold that such a defense goes to the merits of the cause, and not to the jurisdiction of the court to hear and determine the action and to issue valid orders. As this Court has stated, jurisdiction means "the power of the court to adjudicate between the parties" (*Swift & Co.* v. *United States*, 276 U. S. 311, 327); "the power to decide a justiciable controversy [including] questions of law as well as of fact" (*Binderup* v. *Pathe Exchange*, 263 U. S. 291, 305). Jurisdiction is not challenged by denial of the merits of the claim nor is it affected by the conclusion which the court may

[7] All these cases involved disobedience of injunctions, not disobedience of orders to testify or produce evidence in the course of preparation of the case for trial. As we have shown above, disobedience of an order of the latter kind cannot be justified by a showing that the court issuing it lacked jurisdiction. Even in contempt proceedings for violation of injunction decrees, the only defect that can be raised is lack of jurisdiction in the sense of lack of "power to hear and determine a cause." See *Brougham* v. *Oceanic Steam Navigation Co.*, 205 Fed. 857, 859 (C. C. A. 2); *O'Hearne* v. *United States*, 66 F. (2d) 933, 935 (App. D. C.); *E. Ingraham Co.* v. *Germanow*, 4 F. (2d) 1002, 1003 (C. C. A. 2); *Fleming* v. *Warshawsky & Co.*, 123 F. (2d) 622 (C. C. A. 7).

reach on the merits, "for the power to decide necessarily carries with it the power to decide wrongly as well as the power to decide rightly." *Thompson* v. *Terminal Shares*, 89 F. (2d) 652, 655 (C. C. A. 8); see also *Walling* v. *Addison Miller Co.*, 138 F. (2d) 629 (C. C. A. 8), certiorari denied March 13, 1944, No. 670, this Term

In the *Binderup* case, *supra*, a suit for triple damages under the Anti-Trust Laws, it was claimed, as in the instant case, that the transactions in question were intrastate and therefore outside the scope of the Federal statute. The ruling of the District Court dismissing the complaint was affirmed by the Circuit Court of Appeals "for want of jurisdiction in the District Court." This Court, overruling the contention that a jurisdictional question was involved, pointed out that "an issue as to the legal sufficiency of the facts alleged" or an issue as to the merits of the action does not go to the court's jurisdiction. The court's "jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged any more than upon the way it may decide as to the legal sufficiency of the facts proven. Its decision either way upon either question is predicated upon the existence of jurisdiction, not upon the absence of it" (263 U. S., at pp. 305–306). In *General Investment Co.* v. *New York Central R. R. Co.*, 271 U. S. 228, this Court fur-

ther elaborated upon and clarified the meaning of "jurisdiction," pointing out (pp. 230–231):

> * * * By jurisdiction we mean power to entertain the suit, consider the merits and render a binding decision thereon; and by merits we mean the various elements which enter into or qualify the plaintiff's right to the relief sought. There may be jurisdiction and yet an absence of merits.[8]

That the district court in the instant case had "power to entertain" the main action brought by the Administrator against the Bank, and to "consider the merits" of the action, seems too plain for argument. Section 17 of the Fair Labor Standards Act expressly confers upon the district courts jurisdiction to enjoin violations of the Act. The action in which petitioners were ordered to testify and product records was undeniably an action under this federal statute. The complaint set forth "a substantial claim under a federal

[8] See to the same effect *Illinois Central R. R. Co.* v. *Adams*, 180 U. S. 28; *Erickson* v. *United States*, 264 U. S. 246; *United States* v. *Archibald McNeil & Sons*, 267 U. S. 302; *Smyth* v. *Asphalt Belt Ry.*, 267 U. S. 326; *Moore* v. *N. Y. Cotton Exchange*, 270 U. S. 593; *Langnes* v. *Green*, 282 U. S. 531; *Howat* v. *Kansas*, 258 U. S. 181; *The Fair* v. *Kohler Die Co.*, 228 U. S. 22; *Brougham* v. *Oceanic Steam Navigation Co.*, 205 Fed. 857, 861 (C. C. A. 2); *McCann* v. *New York Stock Exchange*, 80 F. (2d) 211 (C. C. A. 2); *Locke* v. *United States*, 75 F. (2d) 157 (C. C. A. 5), certiorari denied, 295 U. S. 733; *Trickett* v. *Kaw Valley Drainage District*, 25 F. (2d) 851 (C. C. A. 8), certiorari denied, 278 U. S. 624; *National Ben. Life Ins. Co.* v. *Shaw-Walker Co.*, 111 F. (2d) 497 (App. D. C.); *In re Stuart*, 114 F. (2d) 825 (App. D. C.); *Fletcher* v. *McMahon*, 121 F. (2d) 729 (App. D. C.).

statute" and therefore presented "a case within the jurisdiction of the court" (*Binderup* v. *Pathe Exchange, supra,* at p. 305).[9] Thus, even if petitioners were entitled to challenge the court's jurisdiction, they have not challenged jurisdiction by denying the applicability of the Act.

3. Petitioners contend that their assertion that none of the Bank's employees was covered by the Act constitutes "the sole evidence" in the record as to the District Court's jurisdiction, that the record on appeal contains no showing of jurisdiction, and that the Court of Appeals erroneously went outside of the record and took cognizance of the allegations of the complaint in ruling that the District Court had jurisdiction (br. in support of pet., pp. 17, 21–25).[10] Even if it be assumed that petitioners were entitled to question the court's jurisdiction, and also that there is merit in the contention that the contempt orders are void unless the jurisdiction of the District Court

[9] The district court, having jurisdiction to entertain the main action, was authorized by Rules 26 and 34 of the Rules of Civil Procedure to order petitioners to produce records and to testify in advance of trial, and by Rule 37 to commit them for contempt for refusal to obey such orders.

[10] In making this contention, petitioners seek to capitalize upon their own omission, since, as appellants, they were primarily responsible for the content of the record on appeal. Under the circumstances, it would hardly be a "shocking" denial of due process (cf. pet. p. 18) for the court to take cognizance of the jurisdictional allegations in the omitted pleadings. However, as pointed out in the text, the jurisdictional allegations sufficiently appear from the pleadings which were included in the record.

affirmatively appears from the record *on appeal*,[11] petitioners are in error in stating that the record on appeal contains no showing of jurisdiction. As we have shown above, whether the District Court had jurisdiction depends, not (as petitioners' argument assumes) upon whether any of the bank's employees were covered by the Act, but upon whether the suit against the bank was one which the District Court had "power to entertain." Although the complaint in the main action was omitted from the record on appeal, the nature of the complaint and the jurisdiction of the court adequately appear from other pleadings and admissions which were included in the record.[12]

Thus, in their returns to the orders to show cause, petitioners stated that the main action "is one for an injunction brought under the provisions of the Fair Labor Standards Act" (R. F. 47; R. S. 22), and that the complaint charged violation of the minimum, overtime, and record-keeping requirements of the Act (R. F. 49; R. S. 25). Again in the memorandum of points and authorities, which was made a part of the notice of motion

[11] The District Court, of course, had the complaint and all other pleadings in the main action before it when it issued the orders.

[12] The Circuit Court of Appeals, in a footnote to its opinion (R. F. 199; R. S. 182), said that, since the complaint and answer in the main action were not in the record, its statements regarding the condition of the pleadings were obtained from the briefs. The court apparently overlooked the fact that the necessary information appears in other pleadings and admissions in the record.

to quash the orders to show cause (R. F. 63; R. S. 50), petitioners asserted that the Administrator's action against the Bank was for an injunction brought "under Section 17 of the Fair Labor Standards Act * * *" (R. F. 63; R. S. 51). In the hearing before the District Court, the transcript of which is in the record, petitioners' counsel conceded that the complaint alleged that the bank's employees were engaged in interstate commerce (R. F. 133).[13] Indeed, the petitions for certiorari (p. 2) themselves state that the complaint sought an injunction against the bank for

[13] Petitioners, in their brief in the Court of Appeals, expressly stated that they did not challenge "the general jurisdiction over the parties litigant and the subject matter in the suit in the District Court" (app. br. p. 17). In view of this admission it has been difficult to understand petitioners' contention that the court had no jurisdiction to order them to testify or produce records relating to the subject matter in the main suit or to hold them in contempt for disobeying such orders. Their reasoning seems to be that the contempt proceeding is an entirely separate and independent action (br. in support of pet., p. 12), and that jurisdiction in the contempt proceeding must be determined without any reference to the court's jurisdiction over the main action. The fallacy in this contention is that a civil contempt proceeding, such as is here involved, instituted to compel obedience to court orders issued for the protection and enforcement of the rights of a party litigant, is not an independent action; on the contrary, the authorities consistently hold that such a proceeding is ancillary to and a part of the main action. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 444–445; *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 328–329. It seems clear that jurisdiction over the subject matter in the main action suffices to establish the jurisdiction of the court over contempt proceedings for disobedience of orders issued in the main action.

violating the Fair Labor Standards Act. Thus the basis of the District Court's jurisdiction adequately appears from the record on appeal without reference to the complaint or any other information outside of the record.[14]

4. Petitioners' claim that they were denied due process is no more than an assertion in another form that the court lacked jurisdiction because of petitioners' denial that the Act was applicable to the Bank's employees. Determination of the merits of the main cause of action is not an element of due process in contempt proceedings. Every requirement of due process was met in the contempt proceeding here. Petitioners were informed of the nature and character of the complaint against them and were given ample opportunity to make defense. They were represented by counsel of their choice and hearings were extended over such a period of time as to afford full opportunity to prepare and submit to the court any evidence they may have desired in justification or in mitigation of their conduct.[15] Thus,

[14] The complaint is not the sole source of jurisdictional facts; it suffices if the jurisdictional facts appear "somewhere in the record." *Briges* v. *Sperry*, 95 U. S. 401; *Robertson* v. *Cease*, 97 U. S. 646; *Barnette* v. *Wells Fargo National Bank*, 270 U. S. 438.

[15] The Orders to Show Cause were issued January 16, 1943, returnable on February 1, 1943 (R. F. 45; R. S. 21). On February 15, 1943, the evidence and arguments of counsel were partially heard and the matters continued to March 3, 1943 (R. S. 131; R. F. 143), and again to March 10, 1943 (R. S. 149; R. F. 161), when the orders of commitment were entered.

the requirements of due process outlined in *Cooke* v. *United States*, 267 U. S. 517, were fully complied with.

CONCLUSION

The decision below is plainly correct, and there is no conflict of authorities. Accordingly, the petition for certiorari should be denied.

Respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

Nos. 764 and 765

ALFRED FENTON,

Petitioner,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

Respondent,

RUSSELL G. SMITH,

Petitioner,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITIONERS' REPLY TO BRIEF IN OPPOSITION.

LOUIS FERRARI,
G. D. SCHILLING,
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KENNETH M. JOHNSON,
Of Counsel.

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION.

This reply brief is filed because respondent in his brief in opposition, except in one instance, confuses the issues presented in petitioners' applications for a writ of certiorari with those in the proceeding out of which the alleged contempt arose. The questions involved in the so-called "principal action," such as the question of whether interstate commerce in that proceeding goes to jurisdiction or to

merits, are not here in issue. The single exception to respondent's studious effort to confuse the contempt proceedings with the "principal action" is found in footnote 13, on page 15 of respondent's brief. Respondent there states:

> "Their [petitioners'] reasoning seems to be that the contempt proceeding is an entirely separate and independent action (br. in support of pet., p. 12), and that jurisdiction in the contempt proceeding must be determined without any reference to the court's jurisdiction over the main action."

This is correct: this is exactly the position taken by petitioners.

Respondent then continues:

> "The fallacy in this contention is that a civil contempt proceeding, such as is here involved, instituted to compel obedience to court orders issued for the protection and enforcement of the rights of a party litigant, is not an independent action; on the contrary, the authorities consistently hold that such a proceeding is ancillary to and a part of the main action. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 444-445; *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 328-329. It seems clear that jurisdiction over the subject matter in the main action suffices to establish the jurisdiction of the court over contempt proceedings for disobedience of orders issued in the main action."

Inherent in the above quotation is the admission that if the contempt proceedings are separate proceedings, petitioners are correct in their position, which is that in the contempt proceedings they were denied the rights of due process guaranteed by the Constitution of the United States, and thus certiorari should be granted. The cases cited by respondent do not support his conclusion that contempt proceedings are part and parcel of the principal action; however, the right of contemnors (strangers to the "prin-

cipal action") to a separate and independent right of appeal should be conclusive as to the separate nature of the contempt proceedings. This point of view was taken by the Circuit Court of Appeals in the instant case when it denied the motion to dismiss the appeals; however, in deciding the case on its merits, the Court of Appeals erroneously departed from the proper legal basis on which it had determined the motion to dismiss. On any such appeal the appellate courts must follow the usual criteria in reviewing the decision of the lower court upon the record presented on appeal; the minimum matters to be considered are:

(A) Does the record on appeal show jurisdiction?

(B) Does the record show that the particular acts alleged to be contemptuous are proven?

The record in the cases before this Court is not merely silent as to jurisdiction; it affirmatively establishes lack of jurisdiction. Unless the general jurisdiction to hear and determine in the "principal action" may be transferred in some way to the separate contempt proceeding, there can be no question as to the denial of petitioners' civil rights in this case.

For his conclusion that civil contempt proceedings are not separate from the action out of which they arose, respondent cites only two cases. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 444-445, and *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 328-329. An examination of these cases indicates not merely that they do not support respondent's contention, but on the contrary indicates that contempt proceedings are separate.

In *Bessette* v. *W. B. Conkey Co.*, *supra*, the Court first states:

"In the case at bar the controversy between the parties to the suit was settled by final decree, and from

> that decree, so far as appears, no appeal was taken. An appeal from it would not have brought up the proceeding against the petitioner, for he was not a party to the suit. Yet, being no party to the suit, he was found guilty of an act in resistance of the order of the court."

The Court then states:

> "Considering only such cases of contempt as the present—that is, cases in which the proceedings are against one not a party to the suit, and cannot be regarded as interlocutory—we are of opinion that there is a right of review in the circuit court of appeals."

Gompers v. *Bucks Stove & Range Co.*, 221 U. S. 418, 444-445, involved the violation of an injunction. The court merely held that if the injunction proceeding had been settled, there could be no contempt for a violation of the injunction. Here, nevertheless, the court still recognized the possibility of separate proceedings in relation to contempt, stating:

> "When the main case was settled, every proceeding which was dependent on it, or a part of it, was also necessarily settled,—of course, without prejudice to the power and right of the court to punish for contempt by proper proceedings."

A review of pertinent cases indicates that the rule is quite definitely established that contempt proceedings are separate and apart from the proceeding out of which they arose. The United States Supreme Court in *Hayes* v. *Fischer*, 102 U. S. 121 (prior to statutes increasing its appellate jurisdiction) stated:

> "If the proceeding below, being for contempt, was independent of and separate from the original suit, it cannot be re-examined here either by writ of error

> or appeal. This was decided more than fifty years ago * * *"[1]

The efforts of respondent to confuse the "principal case" with that involving petitioners is again clearly indicated in footnote 5, on page 8, of respondent's brief in opposition, where it is said, in part:

> "* * * petitioners sought to force the court to follow an order of proof which it had refused to follow in denying the motion to dismiss, that is, to try the question of coverage separately and in advance of the issue of compliance. If petitioners were correct in their contention, witnesses would thus be in a position to take out of the court's hands the determination of the order of proof and the course of the trial."

This is not petitioners' contention and has nothing to do with the case before this Court. Petitioners' contention is, that prior to being sent to jail, the United States District Court is required to find every element essential to the offense charged, including primarily the court's jurisdiction, and that this must appear in the record on appeal.

Petitioners' position, which they have continuously asserted, is that the record in the separate proceedings involving them affirmatively shows lack of jurisdiction. Thus the references in respondent's brief as to what the district court may have had before it, or what may be gleaned from

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[1] Following are additional citations indicating the general rule: *Robertson* v. *State*, 104 So. 561, 564:

> "A contempt proceeding raises an issue outside of the pending cause. While in some cases, it may, in a sense, be collateral to the main cause, it is not a part of that cause. It is a separate, independent proceeding, governed by well-established rules of procedure, and has not proper place in the record of the main cause."

Cheney v. *Richards*, 155 A. 642, 644:

> "Proceedings for contempt based upon disobedience to a decree are independent and separate from the original suit."

the pleadings in the record as to the nature of the principal case, have no bearing here. (Res. Br. pages 2 and 14). The principal pleadings of respondent in the case before this Court are the "Application for Adjudication in Contempt" (R. F. 41), and the "Application for Order to Show Cause, etc." (R. S. 15). An examination of these documents (which may roughly be termed the complaints in the proceedings with which we are concerned) will indicate that there are no allegations contained therein to sustain jurisdiction even if in such proceedings an argument could be made that allegations in pleadings equivalent to complaints would sustain jurisdiction.

The only place in respondent's brief where respondent really comes to grips with the true issues presented, is, as indicated, in footnote 13 on page 15. The legal conclusion upon which respondent rests is erroneous and respondent's brief thus fails entirely to meet the issues presented, and certiorari should be granted as prayed for.

Respectfully submitted,

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In the Supreme Court

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vs.

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor,
Respondent.

PETITION FOR REHEARING ON PETITION FOR CERTIORARI.

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Respondent.

PETITION FOR REHEARING ON PETITION FOR CERTIORARI.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioners Alfred Fenton and Russell G. Smith, respectfully petition this Court to reconsider its decision on the petitions for writs of certiorari filed by petitioners in this Court on March 6, 1944, and denied on April 10, 1944.[1] Rehearing is requested because the Circuit Court of Appeals made a substantial departure from the accepted and usual course of judicial proceedings in the following material instances:

1. Where the record on appeal affirmatively established lack of jurisdiction, the Circuit Court found jurisdiction by resort to material contained in briefs.

2. Individuals were sentenced to jail where the record fails to show elements essential to their conviction.

I.

WHERE THE RECORD ON APPEAL AFFIRMATIVELY ESTABLISHED LACK OF JURISDICTION, THE CIRCUIT COURT FOUND JURISDICTION BY RESORT TO MATERIAL CONTAINED IN BRIEFS.

The District Court in a separate proceeding found petitioners guilty of contempt as a result of their failing to obey certain orders issued by said Court in a proceeding under the Fair Labor Standards Act

[1]Because the legal grounds for the petitions for certiorari in both cases are basically the same, the petitions of petitioners for a rehearing are combined.

of 1938. The only evidence in the record pertaining to the jurisdiction of the District Court is found in the affidavits of petitioners which allege that no employees are engaged in interstate commerce (R.F. 47; R.S. 23); thus the record affirmatively established lack of jurisdiction. The Circuit Court of Appeals in sustaining petitioners' conviction for contempt stated that "the Court's jurisdiction was to be determined * * * by reference to the complaint" in the original action. (R.F. 204; R.S. 187.) However, prior to this the Circuit Court had said:

> "The records on appeal do not contain the complaint or the Bank's answer, and what is said here in respect of the condition of the pleadings is obtained from the briefs." (R.F. 199; R.S. 182.)

Even counsel for respondent admitted the error of the Court in this regard. In footnote 12 on page 14 of the brief of respondent in opposition, the following appears:

> "The Circuit Court of Appeals, in a footnote to its opinion (R.F. 199; R.S. 182), said that, since the complaint and answer in the main action were not in the record, its statements regarding the condition of the pleadings were obtained from the briefs. The court apparently overlooked the fact that the necessary information appears in other pleadings and admissions in the record."

Respondent fails to amplify his point of view or to minimize or justify the error of the Circuit Court, which appears to be admitted. Respondent shows nothing in extenuation of the harm which must result from permitting the decision to remain in the books.

Certiorari is required because if not granted the decision of the Circuit Court of Appeals remains as authority for the proposition that the Court may support jurisdiction by freely considering matters not found in the record on appeal and may even resort to the briefs filed by the parties. This is contrary to the well established and salutary rule that on appeal the record on appeal furnishes the basis for review. (*Pilger v. Sutherland* (1932), 57 Fed. (2d) 604; *Chisholm-Ryder Co. v. Buck* (1933), 65 Fed. (2d) 735; *Morris v. District of Columbia* (1941), 124 Fed. (2d) 284.)

To emphasize the error of the Circuit Court of Appeals in this regard it should be sufficient to ask upon which brief shall the Court rely to supply essential elements which are lacking, the brief of petitioner or the brief of respondent? Is the Court free to rely on one brief and to exclude the other? Certiorari is essential in order to correct this most serious departure by the Circuit Court of Appeals from the accepted and usual course of judicial proceedings and to prevent the establishment of a rule which can lead only to disastrous confusion as to the extent and nature of judicial review. Judicial determination under our system of jurisprudence must be based upon *proof* not upon partisan representations contained in briefs. To do otherwise is to completely disregard the fundamentals of judicial procedure and to substitute pure assumption for fact.

II.

INDIVIDUALS WERE SENTENCED TO JAIL WHERE THE RECORD FAILS TO SHOW ELEMENTS ESSENTIAL TO THEIR CONVICTION.

In this connection it should be sufficient to point out that petitioners were found, in a separate proceeding,[2] to be in contempt of Court. In the record as to this separate proceeding there was nothing to establish the jurisdiction of the Court. This is an essential requirement in federal cases. (*Ex parte Smith* (1877), 94 U. S. 455, 24 L. Ed. 165; *Fishback v. Western U. Tel. Co.*, 161 U. S. 96, 100, 16 S. Ct. 506, 40 L. Ed. 630; *Grace v. American Central Ins. Co.*, 109 U. S. 278, 283, 3 S. Ct. 207, 27 L. Ed. 932; *Continental Ins. Co. v. Rhoads*, 119 U. S. 237, 239, 7 S. Ct. 193, 30 L. Ed. 380; *Highway Const. Co. v. McClelland*, 14 F. (2d) 406.) The present case is even stronger than one where the record is merely silent. The record set forth positive allegations made under oath by petitioners, which totally destroyed the jurisdiction of the Court. (R.F. 47; R.S. 23.) The record contains nothing in contradiction and also fails to show that any consideration was given to this affirmative defense by the District Court.

Petitioners therefore stand convicted in a case where in the District Court the record (1) fails to establish jurisdiction; (2) contains positive allegations under oath of facts which destroy jurisdiction; (3) fails to show any consideration of a proper matter of defense.

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[2]That contempt proceedings are separate and independent, see *Hayes v. Fischer*, 102 U. S. 121; *Robertson v. State* (1925), 20 Ala. App. 514, 104 So. 561, 564; *Cheney v. Richards* (1931), 130 Me. 288, 155 A. 642, 644.

In the face of the foregoing the Circuit Court affirmed the conviction. The situation is the same as if the Circuit Court had said the record fails to show the essential elements to conviction but on the assumption that Courts generally act properly, the conviction will be affirmed. If this be the rule there can never be any purpose in a record on appeal, and the right of appellate review becomes meaningless.

Certiorari must be granted because the Circuit Court of Appeals has affirmed a judgment where the judgment in material and essential elements thereof is not supported by proof as shown by the record on appeal.

Dated, San Francisco, California,
April 28, 1944.

Respectfully submitted,
LOUIS FERRARI,
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Attorneys for Petitioners.

KENNETH M. JOHNSON,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am one of the petitioners' counsel in the above entitled cause and that, in my judgment, the foregoing petition is well founded in law and in fact, and that said petition is not interposed for delay.

Dated, San Francisco, California,
April 28, 1944.

LOUIS FERRARI,
Attorney for Petitioners.

Due service and receipt of a copy of the within is hereby admitted

this.....*day of April, 1944.*

.....

Acting Solicitor United States Department of Labor,
Wage and Hour Division.

.....

Acting Solicitor United States Department of Labor,
Wage and Hour Division,
Attorneys for Respondent.